IN THE

Supreme Court of the United States.

In the Matter of the Petition of T. M. Duché & Sons (Buenos Aires), Limited, for a Writ of Certiorari Directed to the Circuit Court of Appeals for the Third Circuit to Bring Before the Supreme Court the Case of

T. M. DUCHÉ & SONS (BUENOS AIRES), LIMITED,
Libellant and Appellee,

AGAINST

THE AMERICAN SCHOONER "JOHN TWOHY," HER TACKLE, ETC., RESPONDENT, ALBERT D. CUMMINS AND HOWARD COMPTON,
Claimants and Appellants,

OR

in the Alternative for a Writ of Mandamus Directing the Circuit Court of Appeals of the United States for the Third Circuit to Dismiss the Motion Filed Therein by the Appellants, for Leave to Withdraw Their Appeal and Requiring Said Circuit Court of Appeals to Hear and Determine Said Cause on Its Merits.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI OR IN THE ALTERNATIVE FOR A WRIT OF MANDAMUS.

THE FACTS.

The facts in this case are as follows:

The schooner "John Twohy," warranted to be "*tight, staunch, strong and in every way fitted for the*

intended voyage," was chartered by the claimants to the libellant to carry a full and complete cargo of bones from Buenos Aires to Philadelphia.

The "Twohy" was a reclaimed wreck. When she sailed from Philadelphia for South America to enter on the performance of this charter she had just undergone repairs after having lain in a badly wrecked condition for fifteen months. In the course of her outward voyage, it appeared that she was leaking, the extent of the leak and other conditions attending her outward voyage being unobtainable because of the destruction of her log by claimants after this suit was brought, but before hearing.

On October 21, 1915, having loaded a full cargo, the "Twohy" sailed from Buenos Aires bound for Philadelphia, where she arrived December 28, 1915, and discharged her cargo, a large part of which was found to be wet and damaged. In addition to delivering a part of the cargo in a damaged condition, the ship wholly failed to deliver 149,069 pounds of the bones called for by the bill of lading, which admitted without any qualification whatsoever, the receipt of 1,210,000 kilos, equivalent to 2,670,345 pounds.

The libel in this case set forth two claims: One for short delivery and the other for injury to part of the deliver cargo, both arising out of the unseaworthy condition of the ship.

It appeared that when the vessel was only about nine days out from Buenos Aires she encountered weather which was slightly rough, but not more severe than was to be expected at that time and place. During this rough weather she began to leak badly and continued to do so for the rest of the voyage, the leakage being at the rate of about six inches of water an hour, necessitating pumping every two hours, there being at one time as much as five feet of water in the hold.

The libellant contended that the loss and damage

was due to the unseaworthiness of the vessel, the claimants, defending, that it was due to perils of the sea within the exceptions of the charter party and bill of lading.

The Court below found the vessel unseaworthy and awarded libellant damages for the injury to the part of the cargo delivered, but on the ground that libellant's proof did not sufficiently demonstrate the amount of the short delivery, refused to award libellant any damages on account of that claim.

A final decree was entered on April 16, 1918, and on April 27, 1918, an appeal was taken by the claimants to the Circuit Court of Appeals of the Third Circuit.

This appeal came on for argument in October and November, 1918, and on each occasion was continued at the request of the appellants. It again came on in December, 1918, when the appellants, apparently convinced that no further continuances would be granted, moved for leave to withdraw their appeal.

This motion was opposed by the petitioner here, but on February 10, 1919, the Circuit Court of Appeals over the protest and without the consent of the petitioner, in an opinion by Judge Buffington (Rec., p.), granted the motion, provided the appellant paid the amount of the decree of the District Court with interest and costs within thirty days, which payment the appellant below—the respondent here—is apparently willing, and has offered, to make.

Following this opinion the present petition was filed praying for a writ of certiorari.

THE QUESTIONS OF LAW.

The questions of law presented by the situation in the court below and upon this petition are:

I. Where a libellant in admiralty recovers a part of his claim in the District Court, and is denied the balance thereof, and the respondent appeals to the Circuit

Court of Appeals, can the respondent-appellant thereafter, and after the expiration of the time limited for an appeal by the libellant, withdraw his appeal over the protest and without the consent of the libellant-appellee?

II. Under such facts is it within the legal discretion of the Circuit Court of Appeals to permit the appellant to withdraw its appeal over the appellee's objection and without its consent?

ARGUMENT.

Your petitioner submits that the writ prayed for should be granted for the reasons that the questions involved in the Circuit Court of Appeals were novel ones, of great importance in the Admiralty practice, not heretofore decided by this Court or any other Federal Court; that the decision of the Circuit Court of Appeals in this case is erroneous, tends to complicate the Admiralty practice, is contrary to and to a large extent nullifies important decisions of this Court of such long standing as to have become settled law, and if allowed to stand unreviewed and uncorrected by this Court will, in many cases, as it has in this, work the greatest injustice to suitors who act in reliance upon the decisions of this Court for the protection of their rights and the conduct of their litigation.

To fully realize the scope and effect of the ruling by the Circuit Court of Appeals in this case and to appreciate its practical application, it is necessary to consider the facts and issues presented in this case on the appeal to the Circuit Court of Appeals.

Two issues were raised in the District Court—*First*, the seaworthiness of the *"John Twohy,"* and, *second*, the amount of the loss. The second issue had two branches: (a) Loss arising from damage to part of

the cargo delivered; (b) loss arising from short delivery.

The District Court found the vessel unseaworthy and awarded damages for injury to the cargo delivered, but denied recovery for the short delivery.

These issues were all so closely interwoven that it is necessary to consider them together.

With regard to the issue of seaworthiness in this case, four points must be borne in mind:

First.—The provision in the charter party that the vessel is "*tight, staunch, strong and in every way fitted for the intended voyage*" is an absolute warranty of seaworthiness even against latent defects.

The Edwin L. Morrison, 153 U. S. 199;
The Lockport, 197 Fed. 213;
The Caledonian, 42 Fed. 681.

Second.—The Harter Act, which is not mentioned in the charter, does not operate to relieve the owner or the vessel from liability for the consequences of unseaworthiness, even where it is proved that the owner exercised due diligence to make the vessel seaworthy. It is incumbent on the owner to provide a seaworthy vessel, unless *by contract* he limits his obligation to the exercise of due diligence to make her so.

The Carib Prince, 170 U. S. 655;
The Sandfield, 92 Fed. 663;
Farr & Bailey Co. v. International Navigation Co., 98 Fed. 636;
The Ninfa, 156 Fed. Rep. 512;
The Indrapura, 190 Fed. Rep. 711.

Third.—There is no provision in the charter party limiting the obligation of the owners to provide a sea-

worthy vessel or reducing their obligations in that connection to the exercise of due diligence to make the vessel seaworthy.

Fourth.—The burden of affirmatively proving the seaworthiness of the vessel at the time of loading the cargo, and at the commencement of the voyage, rests upon the ship owner.

> *International Navigation Co. v. Farr & Bailey Co.*, 181 U. S. 218;
> *The Wildcroft*, 201 U. S. 378;
> *Bradley v. Lehigh Valley Co.*, 153 Fed. 350.

The "John Twohy" is an old schooner, which, when built in 1891, was not properly fastened and became badly hogged (Cummins, p. 145). In November, 1913, she was wrecked, and from that time until February, 1915, was lying in a wrecked condition at Southport, North Carolina, and at Philadelphia (Record, p. 27).

Between February and June, 1915, the "Twohy" was repaired and strengthened, and on June 18, 1915, sailed from Philadelphia for Rosario on the River Plate, where she arrived the early part of September (Record, p. 30). On her outward voyage she was found to be leaking, and at the conclusion thereof, the captain removed a turnbuckle rod which had been placed athwartships near her bow and plugged the holes, after which she proceeded to Buenos Aires to load the cargo of bones here involved (Record, p. 28).

Of the details of the outward voyage we have no information owing to the loss or destruction of the log of the vessel during the pendency of this action (Record, pp. 103, 148, 149).

The claimant produced a number of witnesses, all of whom swore that the turnbuckle rod was entirely un-

necessary, added nothing to the strength of the vessel, and had no effect on her strength whatsoever; the claimant himself passes off the presence of the turnbuckle rod as a "whim of mine" (Record, p. 143).

But after the discharge at Philadelphia of the cargo here in question—the turnbuckle rod that had been taken out was, by order of the claimant, put back in the vessel again, at exactly the same place from which it had been taken (Record, p. 148).

This fact alone is sufficient to impeach, if not utterly to discredit, the testimony that the turnbuckle rod was useless and unnecessary.

The true function which this rod did perform, and was in the vessel to perform, was to hold her together and strengthen her and the effect of taking it out was to let her settle back and loosen her seams (Mowatt, pp. 98, 99), *all of which were recaulked and recemented after she discharged her cargo at Philadelphia* (Record, p. 134).

The vessel left Buenos Aires for Philadelphia on October 21, 1915. On October 30th, the weather became a little heavy and continued so for a day and a half. This, however, was ordinary bad weather, nothing extraordinary or unexpected. The master stated that this voyage was "About the usual thing"—"You expect those things, you look for them."

The voyage consumed altogether sixty-nine days, out of which there were six days of bad weather—less than ten per cent. bad—whereas the master states (Forsyth, p. 157), that on the average voyage between Buenos Aires and Philadelphia at that season of the year the average weather would be about twenty per cent. bad—and (Forsyth, pp. 164-165, 167, 168), the bad weather experienced was nothing unusual—"just about the usual thing," "what you would expect"—"just what you look for."

The whole truth is that this vessel had an exceptionally good voyage, and had unusually good weather.

It is most important to notice that in the very first bad weather that this vessel encountered she began to leak very badly. The bad weather encountered after the first day therefore cannot be taken into consideration.

That the vessel could not stand even a few hours of an ordinary storm, not an unusual one, such as could be classed as a sea peril, but an ordinary usual storm such as was to be expected, anticipated and looked for—furnishes the most satisfactory evidence that she was not seaworthy at the inception of her voyage.

On this point the present case is squarely ruled by *Benner Line v. Pendleton*, 210 Fed. 67 (D. C., So. D. N. Y., 1913), affirmed in this particular, in the Circuit Court of Appeals of the Second Circuit, 217 Federal 497, which was in turn affirmed, on certiorari, by the Supreme Court, 246 U. S. 353 (1918), where the question of seaworthiness was disposed of by Mr. Justice Holmes, who said:

> "The ground of the suit is that the vessel was unseaworthy at the beginning of the voyage, and that by reason thereof she sank, and her entire cargo was lost. Both Courts below held that the unseaworthiness was proved, and on the evidence that question may be laid on one side."

In that case an action was brought against the owners of the schooner "Edith Olcott," which three or four days after leaving port sank with all her cargo.

The owners of the vessel proved that she was carefully inspected, overhauled and put in order by a thoroughly competent man before the voyage. One of the experts who examined her reported that she was "in the pink of condition." Witnesses testified that they

found her seams and butts in first-class order, as were her rigging, decks, waterways and chain plates; that she was "in first-class condition," "one of the finest vessels" the witness had ever seen, and "fit to go around Cape Horn in."

The superintendent of the Dry Dock Company testified that she was tight, staunch and strong. The inspector of the American Bureau of Shipping testified that the vessel was "first class," that she had been thoroughly examined for reclassification in 1905, and was given an A1 rating for six years—a rating which would have expired one year after she was lost. He stated that the "Edith Olcott" was "exceptionally well built, exceptionally well cared for, and an exceptionally good vessel at the time she was lost," and that she had the highest rating ever given to a vessel of her age—having been built in 1890. The evidence given by other inspectors was to the same effect.

Clearly the evidence offered in that case as to the seaworthiness of the vessel was much stronger both in quantity and degree than that offered in this case. Yet the Court found in the case cited:

> "But admittedly the weather was not heavy until the night before the leak, and although from that time until the ship was abandoned there was heavy weather, there was nothing so extraordinary about it that a ship in proper condition to make an ocean voyage should not have been in condition to undergo the strain. . . . I have no doubt that her owners believed her to be seaworthy. But facts in such a case speak louder than words, and the fact that she sprang so bad a leak on the first night of heavy weather that occurred upon the voyage, and that there is no adequate explanation given of it, is, in my opinion, not consistent with her being seaworthy at the beginning of the voyage."

This decision of Judge Holt was affirmed on appeal, where Judge Rogers said:

"But neither the good intentions of the respondent nor the competency of this captain can save the respondent from liability if, notwithstanding what was done the vessel was not in reality in a seaworthy condition when this voyage was commenced.

"To constitute seaworthiness the hull must be so tight, staunch and strong as to be competent to resist all ordinary action of the sea and to prosecute and complete the voyage without damage to the cargo."

And again:

"While the weather was heavy, there was nothing so extraordinary about it that a ship in a seaworthy condition should not have been able to stand the strain. The fact that the vessel sprang so bad a leak, and that no satisfactory explanation of the fact has been made, indicates to us, as it did to the court below, that the vessel was not seaworthy as to her hull at the beginning of the voyage."

The only points upon which the case just cited and quoted can be distinguished from the case at bar is that the loss was more serious.

Essential fact for essential fact the cases are identical and the words quoted from the opinions of the courts apply even more strongly to the present case than to the case in which they were written, and the decision in that case flatly rules this one.

See also:

Atlas Portland Cement Co. v. P. Dougherty Co., 205 Fed. 508 (C. C. A. 2nd. Circ.);
The Erskine M. Phelps, 231 Fed. 767 (D. C. N. D. Cal. 1915);
The River Meander, 209 Feb. 931 (D. C. So. D. N. Y., 1913);

Compagnie Maritime Francaise v. Meyer, 248 Fed. 881 (C. C. A. 9th Circ. 1918);
The Edwin L. Morrison, 153 U. S. 199;
The Babin Chevaye, 208 Fed. 966 (1913);
The Aggi, 93 Fed. 484;
The Orcadian, 116 Fed. 930.

Under these decisions the unseaworthiness of the schooner was clearly established in this case, and for the damages resulting therefrom the libellant was clearly entitled to recover.

The loss arising out of the damage to part of the cargo delivered was allowed by the District Court and need not be further considered in connection with this petition. The loss arising from the short delivery, however, is in question, and the facts and contentions in connection therewith are as follows:

The intake weight of the cargo was prima facie established by the bill of lading, which acknowledged, without qualification, receipt of a full cargo of bones weighing 1,210,000 Kilos equivalent to 2,670,345 pounds avoirdupois.

The correctness of the intake weight as set forth in the bill of lading was further supported by additional strong evidence.

The claimants at the trial offered no evidence sufficient to rebut even the prima facie proof made by the bill of lading.

The out-turn weight of 2,521,276 pounds, while a little more involved, is clearly established and has at no point in the case been questioned.

Deducting from the intake weight of 2,670,345 pounds the out-turn weight of 2,521,276 pounds, leaves a net shortage of 149,069 pounds. The value of this quantity of bone at the time and place of delivery is undisputed and was $27 per net ton of 2000 pounds, less freight at the rate of $6 per gross ton of 2240

pounds, or $1613.14, the appellee's claim having been made in the sum of $1612.26 through a mathematical error in calculation.

Reference to the bill of lading (Record, p. 45) discloses that it acknowledges receipt of

> *"a full and complete cargo of bones weighing one million two hundred and ten thousand kilos, marked and numbered as per margin,"*

and in the margin appears:

> *"1,210,000 kilos bones. In this quantity is included 12,474 kilos in 287 bags."*

Nowhere in the bill of lading are these two statements of the quantity of bones in any way qualified by the insertion of "weight unknown," "shipper's weight," or any of the usual similar expressions.

It is well established that a bill of lading which acknowledges receipt of a quantity of goods without more, is strong prima facie evidence of the correctness of the quantity stated and until contradicted by the most satisfactory proof to the contrary, is conclusive on the point

> *The Lady Franklin*, 8 Wallace 328;
> *Planter's Fertilizer Co. v. Elder*, 101 Fed. 1001;
> *DeSola v. Pomares*, 19 Fed. 373.

In *The Presque Isle*, 140 Fed. 202 (D. C. N. D. N. Y.), 1905, it was said:

> "It is uniformly held that a bill of lading is prima facie evidence of the receipt of the merchandise and its condition at the time of delivery (4 Amer. & Engy. of Law, p. 728; Nelson v. Woodruff, 66 U. S. 156, 17 L. Ed. 97; Ellis v. Willard, 9 N. Y. 529; The T. A. Goddard [D. C.], 12 Fed. 174; Lazarus v. Barber [C. C. A.], 136 Fed. 543)."

And in *James v. Standard Oil Co.*, 189 Fed. 719 (D. C. So. D. N. Y.), the Court, holding that the vessel had conclusively established the delivery of all the cases received on board, held that the presumption arising from the statement of quantity in the bill of lading was overcome.

Holt, J., said:

> "This is the number stated in the bill of lading, and the statement in the bill of lading of the number of cases received is strong prima facie evidence of such receipt, but it is not conclusive."

On Appeal the decision was affirmed, 191 Fed. 827 (C. C. A., 2nd Circ.), Judge Ward saying, page 828:

> "The bill of lading in respect to the quantity received is a receipt and, though entitled to great weight as an admission by the ship, it is not conclusive. *The burden lies upon the ship of thoroughly satisfying the Court* that she actually has delivered all the cargo she has received, and *that the bill of lading is erroneous.*"

Under these authorities and the circumstances of this case, the bill of lading weight must stand as correct unless the ship, in the words of Judge Ward, *"thoroughly satisfies the Court that she actually has delivered all the cargo she has received, and that the bill of lading is erroneous."*

We submit that the ship does not sustain this burden so long as she leaves open and unanswered a reasonable explanation of the shortage, supported by and consistent with all the facts of the case, and under which she would be liable. In other words, the ship does not sustain the burden until she has conclusively established that there was no loss, and consequently the bill of lading weight was wrong, or else conclusively demonstrates that the loss was due to a cause for which the ship was not responsible.

In this case there are four possible explanations of the shortage:

First.—Mistake in the intake or bill of lading weight.

Second.—Mistake in the out-turn or delivered weight.

Third.—Natural shrinkage.

Fourth.—That the part of the cargo not delivered was pumped out on the voyage.

If the shortage was due to either of the first, second or third causes, the vessel would be excused from liability; if to the fourth cause, it would have to respond in damages.

There has been no dispute as to the out-turn weight. The claimants have contended that the shortage was due to a mistake in the bill of lading or intake weight, to natural shrinkage or to a combination of the two. The petitioner consistently maintained that the undelivered cargo was pumped overboard, and that the bill of lading weight was correct.

The unqualified statement of the weight of the cargo in the bill of lading is very strong prima facie evidence of its correctness, which in this case is supported by the other evidence in the case.

Captain Forsyth, master of the schooner, testified that libellants' men weighed the bones as they were put aboard and (Record, p. 162) described the method used, which seems to be careful and exact. He said:

> "They have a little trolley track lying in the yard, and they have a little flat trolley and the men will fill those baskets. This little trolley car is weighed in the morning with so many empty baskets. Then they will fill those empty baskets and put them on the trolley car, and run them down and put them on the scales, and each man will take a basket and carry it across the street and dump it down the hold."

In its essential particulars this system of weighing is the same as that used when the vessel was discharged, and which gave such satisfactory results.

The captain was so satisfied with the weighing at Buenos Aires that he was content to sign a clean bill of lading without inserting any of the customary qualifying phrases, such as "shipper's weight," "said to weigh," "weight unknown," etc., and presumably paid the stevedore on the basis of the weight shown.

The shipper had no incentive to overstate the weights inasmuch as the cargo was sold on the delivered weight.

The stevedore, the only person interested in overstating the weight, had, as the master testified (Record, pp. 162-163), nothing to do with the weighing.

All these matters most strongly support the correctness of the bill of lading weight, and give it an evidential value much greater than its mere presence in the bill of lading.

Against these facts there is no controlling evidence worthy of consideration.

The captain testified that he delivered all the cargo he received. This is a mere statement of a conclusion, and if it were to be given controlling weight, shippers and consignees would be placed entirely at the mercy of unscrupulous masters. The other evidence does not support the captain's averment which was predicated, on the fact that when the loading was completed, the hatches were closed and battened down, and were not again opened until the vessel berthed at Philadelphia.

These facts are entirely consistent with that which we contend is the true theory—namely that the missing part of the cargo was pumped overboard with the water which leaked into the vessel.

In this connection it is to be noted that the captain qualified his statement that he had delivered all the cargo he received, when on cross-examination he

admitted (Record, p. 171), that the fine particles of bone might have been pumped overboard.

The only other evidence which it could be argued might tend to impeach the correctness of the bill of lading weight is that referred to by the District Court where it calls attention to the fact that although the bill of lading calls for 287 bags of an average weight of 98 pounds apiece, the out-turn shows the delivery of 241 bags, averaging in weight about 84½ pounds each.

A further examination of the evidence, however, discloses that there is no basis to support the presumption sought to be raised.

In addition to the 241 bags counted, a very considerable number of bags were broken, and were heaved up on deck, together with the bones they had contained.

No one counted the broken bags, and when the master was asked by the Court whether he thought as many as forty-six bags were broken, replied, "They must have been" (Record, p. 161).

The presumption that there was a shortage in the number of bags in the out-turn is purely speculative as there is no evidence whatsoever as to the actual number of bags delivered.

So, too, with any argument based on the difference between the average intake and out-turn weights of the bags.

These bags were of all sizes, and in no way uniform in weight or otherwise. It is exceedingly doubtful whether they were tightly sewed, and it is most likely that a great quantity of the contents could have fallen out, even from the bags that were discharged with bones still in them.

The method of loading was exceedingly likely to break the bags, as was also the working of the cargo on the voyage from Buenos Aires to Philadelphia, and under the conditions attending the loading and carriage of this cargo, and the rough handling to which

it was subjected, the bags most likely to break would be the ones most heavily filled.

Any argument based on the difference between the average intake and out-turn weights of the bags is therefore entirely speculative.

It is thus apparent that to argue from the difference in count and average weight of the bags of bones, is to pile speculation upon speculation to reach a result so wholly speculative as to be impossible of belief.

The existence of the shortage is equally consistent with any explanation that may be made of it, and consequently cannot be urged as impeaching the correctness of the bill of lading weight.

The out-turn weight has not been, and we assume will not be, questioned in this case, and therefore must be taken as conclusively established.

The claimants argue that there is generally a shortage in bone cargoes. This may in fact be admitted. The only testimony as to the extent of such a usual shortage, however, is that of the witness, Burrichter, who testified that the customary shortage is from one to two per cent. as a fair average; that three per cent. or four per cent. would be very unusual. In the present case, the shortage is approximately five and six-tenths per cent., far in excess of even what would be considered very unusual.

The facts exclude the possibility of the existence in this case of the causes of such shrinkage on the ordinary voyage.

The only explanation that can be given of the ordinary shortage is that bones dry out during the voyage (Record, p. 158). It also appears that bones when soaked in water act like sponges, and become saturated, and when exposed to dampness will absorb moisture from it (Record, pp. 77 and 78).

Under these conditions, not only was there in this case no opportunity for any drying out of the cargo,

but on the contrary, under the conditions surrounding the transportation of this cargo there should be an accretion in weight.

For a period of upwards of two months there was constantly a considerable quantity of water in the hold. At times this water was five feet deep and during this period the vessel was leaking at the rate of six inches an hour. The hatches were tightly battened down and covered.

A great quantity of the bones was constantly soaking in the water in the hold, and, coming up through the tropics, it is clear that the atmosphere in the space in the hold of the vessel above the water must have been very moist.

These facts rendered it impossible for the bones in this cargo to dry out on the voyage and exclude the possibility of such an explanation of the shortage.

From the foregoing discussion, it is manifest that the three possible explanations of the shortage which would free the ship from liability are not supported by the evidence in this case, and it remains to consider the fourth possible explanation, namely, that the missing part of the cargo was pumped overboard during the voyage in the form of ammonia and phosphoric acid in solution, and in the form of fine particles of bone.

When chemically analyzed after being discharged at Philadelphia a large part of the bones were found to be deficient in certain of their soluble constituents—in the ammonia to the extent of ¾ per cent.; in phosphoric acid to the extent of 6½ per cent., or, in all, to the extent of 23,795 pounds. It is obvious that to this extent the shortage is accounted for by the pumping overboard of this quantity of ammonia and phosphoric acid in solution.

As to the remainder of the shortage the evidence clearly sustains the theory that it was pumped over-

board in the form of fine particles of bone—bone dust. The master, it is true, first testified that the bone could not have gotten into the pumps, but when cross-examined he excluded from his statement the fine bone particles and admitted that these might have been pumped overboard (Forsyth, p. 144).

A very large part of the cargo when loaded was in the form of this fine machine-crushed bone—the process of loading and the motion and working of the cargo during the voyage, all would operate to reduce still more of it to this condition.

These finer particles would all sift to the bottom of the hold, thence through the ceiling into the pumps and through the pumps overboard.

There is nothing in the facts shown or attempted to be shown at the trial which is inconsistent with this last explanation of the shortage, as there is with the others; on the contrary, the evidence and the facts clearly point to the last explanation as the true manner in which the shortage occurred.

The foregoing explanations of the shortage are the only ones possible.

Can it be held that the ship has sustained the burden of proving the incorrectness of the bill of lading weight by "*thoroughly satisfying the Court that she actually has delivered all the cargo she has received and that the bill of lading weight is erroneous*" when she in no way has excluded the explanation of the loss which is demonstrated by the overwhelming weight of the evidence to have been the true explanation and under which the ship is liable?

We submit that the evidence most clearly establishes the vessel's liability and that the District Court erred in failing to award to libellant its full claim.

It remains to note a suggestion found in the opinion of the trial Judge, who (Record, p. 190), said:

"At the same time, the part of the cargo which had been dissolved by the action of the salt water and thus lost to the shipper would be included in any claim for damage made because of the cargo having become wet. It is, therefore, important to keep clear the distinction between the shortage in the cargo as such and a loss in bulk or weight of the cargo due to the damage from salt water, lest the two claims be permitted to overlap, and in this way there be a double allowance of the damage claim."

The trial Judge felt that if the libellant's claim were allowed in full, there would be an overlap and double damages awarded. This thought was based on the fact that in showing the nature of the damage to the cargo, libellant showed that the damaged bones were deficient in some of their soluble constituents, and from this the Court reasoned that the allowance of the libellants' claim for damage would also reimburse libellant for the shortage up to the amount of the dissolved and lost constituents of the damaged bone.

This is most clearly and demonstrably wrong. The damage claim is purely and simply the difference between the contract price and the actual market value in its damaged condition of the net delivered weight of the injured portion of the cargo, and is not in any way based on the quantity or weight of the missing constituents of this damaged bone.

The error of the trial Court's theory is most clearly demonstrated mathematically by the accompanying table (opposite this page) which shows most clearly that the full allowance of both claims made on behalf of the libellant would involve no overlap or double damage whatsoever, but, on the contrary, would only make the libellant whole for the damage it suffered owing to the unseaworthiness of the schooner.

ANSWER TO THE THEORY OF DISTRICT COURT AS TO OVERLAP AND DOUBLE DAMAGES.

1. If all the bones called for by the Bill of Lading had been delivered, Libellant would have received:				
2,670,345 lbs. @ $27.00 per 2000 lbs.		$36 049 66		
Less Freight on same @ $6.00 per 2240 lbs.		7 152 70		
Net receipts			$28 896 96	
2. Libellant on the cargo actually delivered did receive:				
2,194,174 lbs. @ $27.00 per 2000 lbs.	$29 621 35			
327,102 lbs. @ $21.30 per 2000 lbs.	3 483 64			
		33 104 99		
Less Freight on 2,521,276 lbs. @ $6.00 per 2240 lbs.		6 753 42		
Net receipts			26 351 57	
3. Actual Loss to Libellant				$2 545 39
4. If full recovery allowed, Libellant will receive:				
Damages for injury to 327,102 lbs. @ $5.70 per 2000 lbs.			932 24	
Damages for short delivery 149,069 lbs. @ $27.00 per 2000 lbs.		2 012 43		
Less Freight on 149,069 lbs. @ $6.00 per 2240 lbs.		399 29	1 613 14*	
Net recovery				2 545 38
5. Excess of Loss over Recovery				01

*Through a mathematical error in original calculation of the Libellant's claim the value of the bones not delivered is stated as $1612.26—the correct figure is that given above—$1613.14.

The District Court thus denied recovery to your petitioner for short delivery upon what was clearly an entirely erroneous conception of the law and of the legal sufficiency of evidence, and in no way involved any question of credibility of witnesses.

The claimants in the District Court appealed and when the appeal was finally called for argument, after the expiration of the time limited for the present petitioner to appeal had expired, the claimants moved to withdraw their appeal.

This motion the Circuit Court of Appeals, without passing upon the merits of the case, has granted, to the injury of your petitioner who is thereby deprived of the valuable and substantial right of having its claim, denied in the District Court, passed upon de novo in the Circuit Court of Appeals, a right upon which, under the decisions of this court, it was entitled to rely.

THE ACTION OF THE CIRCUIT COURT OF APPEALS IS INCONSISTENT WITH THE RULINGS OF THIS COURT IN IRVINE V. "THE HESPER" AND REID V. THE AMERICAN EXPRESS CO. AND NULLIFIES THE RULE THAT ON AN APPEAL IN ADMIRALTY THE CASE IS TRIED DE NOVO IN THE CIRCUIT COURT OF APPEALS.

Under the decisions of this Court in *Irvine v. "The Hesper,"* 122 U. S. 256, and the many cases following that decision, particularly the recent emphatic approval of its doctrine by his Honor, the present Chief Justice, in *Reid v. American Express Company,* 241 U. S. 544, an appeal in Admiralty vacates the decree of the District Court, and brings the whole case before the Circuit Court of Appeals for a trial de novo.

As stated by Mr. Justice Blatchford in *Irvine v. "The Hesper"* (*supra*), at page 266:

"It is well settled, however, that an appeal in

admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried de novo in the Circuit Court. Yeaton v. United States, 5 Cranch 281; Anonymous, 1 Gallison 22; 'The Roarer,' 1 Blatchford 1; 'The Saratoga' v. 438 Bales of Cotton, 1 Woods 75; 'The Lucille,' 19 Wall. 73; 'The Charles Morgan,' 115 U. S. 69, 75. *We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libellants appealed, they did so in view of the rule and took the risk of the result of a trial of the case de novo. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants.*" (Italics ours.)

This holding was reaffirmed in *Reid v. The American Express Co.* (supra), where his Honor, the present Chief Justice, said:

"It is not denied that in the Second Circuit the right to a de novo trial was considered as settled by Munson S. S. Line v. Miramar S. S. Co., Limited, 167 Fed. Rep. 960, and that a well-established practice to that effect obtained, but it is insisted that a general review of the adjudged cases on the subject will show the want of foundation for the rule and practice. But we think this contention is plainly without merit and that the right to a de novo trial in the court below authoritatively resulted from the ruling in Irvine v. 'The Hesper,' 122 U. S. 256, a conclusion which is plainly demonstrated by the opinion in that case and the authorities there cited and the long continued practice which has obtained since that case was decided and the full and convincing review of the authorities on the subject contained in the opinion in the Miramar Case. Entertaining this view, we do not stop to consider the various arguments which are here pressed upon our attention

> tending at least indirectly to establish the non-existence of the right to trial de novo in the court below or that this case for reasons which are wholly unsubstantial may be distinguished and made an exception to the general rule, because to do so would serve no useful purpose and would be at least impliedly to admit that there was room to discuss a question concerning which there was no room for discussion whatever."

What do these cases mean? Obviously and necessarily they mean what they say, that in an admiralty appeal the Circuit Court of Appeals is not sitting as a court of review, but as a trial court, hearing and determining the case upon the pleadings and proofs submitted in the District Court and any additional proofs that may be properly introduced in the Circuit Court of Appeals.

Is it conceivable that any trial court has the legal discretion, at the defendant's request and over the protest and objection of the plaintiff, to refuse to hear and determine the claim made by the plaintiff against the defendant where the parties and subject matter are properly before the court and within its jurisdiction?

Manifestly it cannot do so; and yet, such is the necessary result of the ruling of the Circuit Court of Appeals in this case, inasmuch as under the decisions in *Irvine v. "The Hesper"* and *Reid v. The American Express Co.*, the Circuit Court of Appeals must be regarded in this case as a trial court.

This point here raised is a novel one, as was recognized in the opinion of Judge Buffington in this case when he says (Record, p.):

> "We find no reported case involving the precise question here raised."

The decision of the Circuit Court of Appeals in this case has a most far-reaching effect. Its scope is

wide and its application broad. If it is to stand, an appellee in admiralty, a part of whose claim was denied in the District Court, can no longer rely upon the decisions of this Court in *Irvine v. "The Hesper"* and *Reid v. The American Express Company*, to secure him his right to be heard thereon in the Circuit Court of Appeals. To protect himself he will be under the necessity of assuming the burden and expense of taking a cross appeal, thereby encumbering the record and adding most materially to the expense, annoyance and inconvenience of litigation, increasing its complexities, and in most cases undoubtedly, causing additional delay—already one of the greatest objections and most serious defects in the administration of justice.

It is suggested in the opinion of Judge Buffington in this case that to refuse the motion and hold the appellant not entitled to withdraw his appeal will work a great hardship to the appellant by limiting his control of his litigation. But this suggestion is a mistaken one.

In the words of Mr. Justice Blatchford in *Irvine v. "The Hesper,"*

> "When the libellants appealed they did so in view of the rule, and took the risk of the result of a trial of the case de novo."

The appellant, therefore, is confronted by no hardship—he acts with his eyes open.

The result of refusing to permit the appellant in such case to withdraw his appeal over the appellee's objection would, on the other hand, be most wholesome.

It would go far to curb and put an end to the taking of hasty and ill-advised appeals, would secure to the appellee his right to be heard de novo without the necessity of complicating the admiralty procedure by

taking a cross appeal, and would prevent the most patent injustice to an appellee who, in proper reliance upon the decisions of this Court in *Irvine v. "The Hesper"* and *Reid v. The American Express Company*, has felt secure in his right to be heard, would otherwise find that this right has been swept away from him at a time when his own right to appeal had expired and he was no longer able to avail himself thereof.

While there seem to be no Federal Court decisions on the precise point here raised, there have been one or two State Court decisions thereon and these plainly and clearly support the rule for which we here contend.

In *Peterson v. Frey*, 109 Mich. 689, a case where an appeal was taken under a statute which provided that the appellate court should *"become possessed of the case, the same as if it had been originally commenced in said Appellate Court,"* it was held that an appellant could not dismiss his appeal without the consent of the appellee.

In *Brigham v. Waterhouse*, 32 Texas 468, a case where under the statute an appeal effected a trial de novo in the appellate court, it was held that the appellant could not withdraw his appeal without the consent of the appellee.

The rule announced in these cases is, we submit, correct and consistent with good practice and the decisions of this Court.

What discretion an appellate court has to permit the withdrawal of an appeal is necessarily limited by legal precedents and rules, and certainly should not and cannot be exercised to deprive an appellee of a valuable and substantial right.

In the present case, and in all cases where by an appeal the cause is brought before the appellate court

for a trial de novo, an appellee, a part of whose claim has been denied in the District Court, has a right to have the appellate court hear and determine his claim de novo, as a court of first instance.

This right is a valuable and substantial one, of which the appellee should not be deprived without his consent, and we submit that it is no more within the legal discretion of the appellate court in such a case to deprive the appellee of this right, than it is within the discretion of any other trial court at the defendant's request and over the plaintiff's objection to refuse to hear and determine on its merits a cause in which the parties and the subject-matter are properly within its jurisdiction and before it for determination.

The novelty and importance of the point here raised, its wide scope and application, the serious hardship and injustice arising in this case and likely to arise in future cases out of the erroneous decision of the Circuit Court of Appeals herein, the necessity for the proper determination of the practice of the courts and the general interests of jurisprudence, make this case most surely one for the exercise by this Court of its supervisory and corrective powers.

CONCLUSION.

We, therefore, submit that on the foregoing reasons this Honorable Court should exercise the power vested in it to issue the writ of certiorari prayed for and have this cause brought before it for review and final determination *or* in the alternative that this Honorable Court should exercise the power vested in it to issue a writ of mandamus directed to the Circuit Court of Appeals of the Third Circuit and directing said Circuit Court of Appeals to dismiss the motion filed by

the appellants therein for leave to withdraw their said appeal and requiring said Circuit Court of Appeals to hear and determine the said cause upon its merits.

Respectfully submitted,

CONLEN, BRINTON & ACKER,
HARRINGTON, BIGHAM & ENGLAR,
Proctors for Petitioner.

WILLIAM J. CONLEN,
Advocate.